WARRANTIES IMPLIED IN SALES OF PERSONAL PROPERTY IN THE UNITED STATES AND CANADA.

THE recent case of *Peoples' Bank* v. *Kurtz*, reported in 11 Weekly Notes of Cases (Phila.) 225, has suggested a review of the American cases on the subject of the warranties that are implied in sales of personal property. We shall confine ourselves to a discussion of the law involved in the American decisions, as the English authorities upon this question have been very exhaustively reviewed by Mr. Benjamin, Q. C., in his very able Treatise on Sales.

It will be convenient to consider the subject under the following heads:

I. THE IMPLIED WARRANTY OF TITLE.
- (*a*) *Sales.*
- (*b*) *Exchanges*
- (*c*) *Sale of an Interest in a Chattel.*
- (*d*) *Sale by a Judicial Officer.*
- (*e*) *Distinction made between Goods in, and not in, possession of Vendor.*
- (*g*) *Proof of Eviction or Disturbance before Action.*

II. IMPLIED CONDITION OF EXISTENCE.

III. SALE OF GOODS BY DESCRIPTION.
- (*a*) *Sale of Chattels.*
- (*b*) *Sale of Negotiable Instruments, Prospectuses, &c.*
- (*c*) *Merchantability implied in sales of Goods by Description when not Inspected by Vendee.*

IV. GOODS SOLD TO ORDER.

V. SALE OF GOODS FOR SPECIAL USE.
- (*a*) *Vendor's skill relied upon.*
- (*b*) *Vendor's skill not relied upon.*

VI. IMPLIED WARRANTY OF SOUNDNESS IN SALES OF PROVISIONS.

VII. WARRANTY IMPLIED FROM A USAGE OF TRADE.

VIII. Sale by Sample.

(*a*) *General rule.*

(*b*) *Production of Sample not necessarily sale by Sample.*

(*c*) *Implied warranty of merchantability in a sale by Sample.*

I. The Implied Warranty of Title.

(*a*) *Sales.*

The courts have frequently said that where a party sells personal property as his own he thereby impliedly warrants the title to the article sold. For the most part, however, these expressions of opinion have been the mere dicta of individual judges and not necessary to the decision of the case before them, and it is somewhat difficult to find a case where this point has been decided, and was necessary to the decision of the case, or at all events where the question has been argued at any length by the court.

In *Peoples' Bank* v. *Kurtz*, 11 Weekly Notes of Cases 225, it was held that the vendor of a certificate of stock in his possession warrants his own title thereto, and that it is a genuine certificate issued by the duly constituted officers of the company, and sealed with the genuine seal of the corporation; though he does not warrant that such certificate does not constitute part of a fraudulent over issue of stock, or the solvency of the company.

Sharswood, C. J., said: "It was held at first that in an action on the case for deceit against a party who had sold a personal chattel to the plaintiff, to which he had no title, it was necessary to aver a *scienter* (*Dale's Case*, Cro. Eliz. 44; *Roswel* v. *Vaughan*, Cro. Jac. 196); but this doctrine was subsequently exploded, and an averment of possession considered sufficient, as the vendor must be intended cognizant of his own title, the sale being necessarily an affirmation of title: *Crosse* v. *Gardner*, Carth. 90; *Medina* v. *Stoughton*, 1 Ld. Raym. 593. It may now be regarded as well settled, that a party selling as his own, personal property of which he is in possession, warrants the title to the thing sold; and that if by reason of a defect of title nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor."

In *Ricks, Administrator*, v. *Dillahunty*, 8 Porter (Ala.) 137, the same principle was laid down; Collier, C. J., saying: "It is understood that the seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the

buyer for the loss if the title is in another person (3 Black. Com. 166; *Stuart* v. *Wilkins*, Doug. 18; *Furnis* v. *Leicester*, Cro. Jac. 474; *Crosse* v. *Gardner*, Carth. 90; *Mockbee's Administrator* v. *Gardner*, 2 Har. & G. 176; *Chism* v. *Woods*, Hardin 531; *Osgood* v. *Lewis*, 2 Har. & G. 495; *Defreeze* v. *Trumper*, 1 Johns. R. 274);" and SELDEN, J., in *Hoe* v. *Sanborn*, 21 N. Y. 555: "It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells; he knows the source from which such title was obtained, and has, therefore, means of judging of its validity which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell. Some slight doubt has been supposed to be thrown upon this doctrine, in England, by the remarks of PARKE, B., in the case of *Morley* v. *Attenborough*, 3 Exch. 500. It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz.: the presumed superior knowledge of the vendor in regard to his title. The case of *Morley* v. *Attenborough* itself tends, in my view, to confirm this position. It arose upon a sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which 'stated on the title page that the goods for sale consisted of a collection of forfeited property.' The court held that there was no implied warranty of title in that case. There was, perhaps, good reason why this case should be considered an exception to the general rule; the pawnbroker could not justly be presumed to have any special knowledge in regard to the ownership of the articles pledged. The probability was that he had received them upon the faith of the pledgor's possession alone, and the purchaser was, in this respect, upon an equal footing with himself."

The same doctrine was again enunciated by the court in *McKnight* v. *Devlin*, 52 N. Y. 401 (1873); ALLEN, J., said, "The notes were given for personal property, and in the absence of an express warranty of title the law would imply such warranty. Every vendor of chattels is supposed to know his title, and to warrant it, if he sells without disclosing any defects that may exist in

it." In this case, however, there was an express warranty of title by the seller.

The question was very fully considered by the Court of Queen's Bench of Canada, in the recent case of *Brown* v. *Cockburn et al.*, 37 U. C. Q. B. 592, and though in that case there was merely an executory contract of sale, and not the sale of an ascertained article, and it was only decided that in an *executory* contract of purchase and sale where the subject is unascertained, and is afterwards to be conveyed, a warranty of title by the vendor will be implied, as the subject was more fully discussed by the court than in any other case in America, of which we are aware, we shall quote some extracts from the opinion.

"It is contended by the plaintiff that as at the time of the sale there was no express warranty of title none is to be implied, and that the rule of *caveat emptor* applies. The law of England as to when a warranty of title will or will not be implied in a sale of goods is not entirely free from doubt. The rule of the civil law as given by Pothier is as follows: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale to warrant and defend the buyer against eviction from that possession. This obligation is called a warranty: Pothier, Vente, part 2, ch. 1, sect. 2, No. 82.

"By the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, but the law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor*, *&c.*: Co. Litt. 102 a. See also Noy's Maxims 42.

"Blackstone says the law is different as to goods, if the vendor 'sells them as his own:' 2 Black. 451.

"The first decision in England of which we have any record is, according to Mr. Benjamin in his learned work on Sales of Personal Property, 2d ed., p. 516, *L'Apostre* v. *L'Plaistrier*, mentioned in 1 P. Wms. 318, as a decision on a different point, but when it was cited as an authority in *Ryall* v. *Rowles*, 1 Ves. 348, LEE, C. J., sitting with Lord Chancellor HARDWICKE, said, 'My account of that case is different from that in Peere Williams. * * * It was held by the court that offering to sell generally was sufficient evidence of offering to *sell as owner*, but no judgment was given, it being adjudged for further argument.' In *Dickenson* v. *Naul*, 4 B. & Ad. 638, where an auctioneer employed by

a supposed executrix sold goods of the testator, but before payment the real executor claimed the money from the buyer, it was held that the defendant was not liable to pay the auctioneer for the goods. In *Allen* v. *Hopkins*, 13 M. & W. 94, a somewhat similar case, *Dickenson* v. *Naul*, was approved; POLLOCK, C. B., saying, at page 102, 'It appears to us that the defendant was placed in no such difficulty; that he had a right simply to say as he has done; that the plaintiff had no authority to sell the goods in question, as the property in them was in another, and that he had discovered that person and paid him the value of the goods. It was put in the argument on the ground of *caveat emptor.* I certainly can find no authority, and I have no recollection of ever hearing that doctrine applied to this case, that the buyer is bound to take care that the plaintiff has a good title to the goods, and that if it turn out that the plaintiff has not a good title the buyer of the goods should have taken care of that before he made the contract, and therefore is bound by the contract, notwithstanding he is able to prove that the seller had no title. The doctrine of *caveat emptor* applies not at all, as I apprehend, to the title of the plaintiff, but to the condition of the goods.'

"But in *Morley* v. *Attenborough*, 3 Ex. 500, which was the case of a pawnbroker selling an unredeemed pledge, the court held, with certain exceptions, that the rule *caveat emptor* applies, that there is no implied warranty of title in the contract of sale of a personal chattel, and that in the absence of fraud a vendor is not liable for a defect of title, unless there be an express warranty or *an equivalent to it by declaration or conduct.*

"In *Chapman* v. *Speller*, 14 Q. B. 621, which was an action for goods sold at a sheriff's sale, it was held that there was nothing equivalent to a warranty by declaration or conduct; the defendant having bought simply the interest of the execution debtor. PATTESON, J., however, in delivering judgment said, at p. 624, 'In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon *an ordinary purchase* of a chattel, where the purchaser does not have that for which he paid.' In *Sims et al.* v. *Marryat*, 17 Q. B. 281, an action in respect of the sale of a copyright, the conduct of the vendor was held to be equivalent to an express warranty of title; Lord CAMPBELL saying, at p. 290, 'I do not think it necessary to inquire what the law would be in the

absence of an express warranty. * * * The decision in *Morley* v. *Attenborough*, 3 Ex. 500, was that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve: but a great many questions, beyond the mere decision, arise on the very able judgment of the learned baron in that case, which I fear must remain open to controversy. It may be that the learned baron is correct in saying that, on the sale of personal property, the maxim of *caveat emptor* does by the law of England apply; but if so *there are many exceptions stated in the judgment which well nigh eat up the rule.*'

"The rule as laid down in *Morley* v. *Attenborough*, was followed in *Hall* v. *Conder et al.*, 2 C. B. (N. S.) 22, which was the sale of an alleged patent right. But in *Eichholz* v. *Bannister*, 17 C. B. (N. S.) 708, which was an action in respect of goods sold in an open shop, ERLE, C. J., said, at p. 725, 'I think justice and sound sense require us to limit the doctrine so often repeated that there is no implied warranty on the sale of a chattel. I cannot but take notice that, after all the research of two very learned counsel (*C. Pollock* and *Holker*), the only semblance of authority for this doctrine, from the time of NOY and Lord COKE, consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent brother WILLIAMS, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of judgment. * * * It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.'

"In *Eichholz* v. *Bannister*, it was held, that by selling in an open shop the defendant had so conducted himself as to bring himself within one of the recognised exceptions to *Morley* v. *Attenborough*. * * *

"In *Bagueley et al.* v. *Hawley*, L. R., 2 C. P. 625, which was an action in respect of the sale of a boiler set in brickwork, it was held (WILLES, J., *dissentiente*), that there was no conduct amounting to a warranty of title. The case does not appear to have been carried any further.

"Mr. Benjamin, in his very able work on Sales, 2d ed., p. 522, has stated the result of the authorities as follows: 'On the whole, it is

submitted that, since the decision in *Eichholz* v. *Bannister*, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception by reason, as Lord CAMPBELL, said, 'of having been well nigh eaten away.' The rule at present would seem to be stated more in accord with the recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.*'

"If it were necessary for the decision of this case to accept the result as stated by Mr. Benjamin, I should, after a careful perusal of the authorities, have little difficulty in doing so, and in doing so would hold that the plaintiff in this case by selling the logs as his, impliedly warranted that they were his, and that there were no facts or circumstances showing a contrary intention."

The doctrine that the vendor of chattels in possession impliedly warrants the title extends to choses in action: *Ritchie* v. *Summers*, 3 Yeates (Pa.) 531; *Charnley* v. *Dulles*, 8 W. & S. (Pa.) 361; *Swanzey* v. *Parker*, 14 Wr. (Pa.) 450. As in the sale of other things, he undertakes not for their quality, that they are really worth the money they represent, but that they are what they purport to be. In other words he warrants the genuineness of the claim upon them: *Lyons* v. *Divelbis*, 10 Harris (Pa.) 185; per SHARSWOOD, J., in *Flynn* v. *Allen*, 57 Penn. St. 485; *Peoples' Bank* v. *Kurtz*, 11 W. N. C. 225.

The review of the above American cases, we think, is sufficient authority for asserting that the rule laid down by Mr. Benjamin, as the result of the English cases, may equally be said to be the result of the authorities in America. See also *Williamson* v. *Sammons*, 34 Ala. 691; *Chism* v. *Woods*, Hardin (Ky.) 531; *Chancellor* v. *Wiggins*, 4 B. Mon. (Ky.) 201; *Grose* v. *Hennessey*, 13 Allen (Mass.) 390; *Dorr* v. *Fisher*, 1 Cush. (Mass.) 273; *Fogg* v. *Willcutt*, Id. 300; *Bennett* v. *Bartlett*, 6 Id. 225; *Marshall* v. *Duke*, 51 Ind. 62; *Long* v. *Anderson*, 62 Id. 537; *Morris* v. *Thompson*, 85 Ill. 16; *Gookin* v *Graham*, 5 Humph. (Tenn.) 482; *Colcock* v. *Goode*, 3 McC. (S. C.) 513; *Hale* v. *Smith*, 6 Greenl. (Me.) 420; *Butler* v. *Tufts*, 13 Me. 302; *Whitaker* v. *Eastwick*, 75 Penn. St. 229; *Dresser* v. *Ainsworth*, 9 Barb. N. Y.) 619; *Vibbard* v. *Johnson*, 19 John. (N. Y.) 77; *Heer-*

mance v. *Vernoy*, 6 Id. 5; *Sweet* v. *Colgate*, 20 Id. 196; *Johnston* v. *Barker*, 20 Upper Canada C. P. 228; *Mercer* v. *Cosman*, 2 Hannay (N. B.) 240; *Porter* v. *Bright*, 82 Penn. St. 443.

(*b*) *Exchanges.*

It is obvious that where one exchanges goods with another he impliedly warrants his title, as in the case of a sale. "There can be no doubt," said CHRISTIANCY, J., in *Hunt* v. *Sackett*, 31 Mich. 18, "that a warranty of title, on the part of the defendant, was implied in the contract of exchange as it would have been upon a sale." See also *Patee* v. *Pelton*, 48 Vt. 183; *Byrnside* v. *Burdett*, 15 W. Va. 717; *Sargent* v. *Currier*, 49 N. H. 310.

(*c*) *Sale of an Interest in a Chattel.*

One apparent exception to the general rule is in the case of a sale of an interest in an article instead of the article itself. But if analyzed this will be seen not in reality an exception; as the sale of an interest, or a sale of all one's right, title and interest in a thing, obviously means to substitute the vendor's interest in the thing for the thing itself, and thereby excludes all idea of a warranty of title to the chattel sold, beyond the vendor's interest, which may amount to nothing. See *First Nat. Bank* v. *Mass. Loan & Trust Co.*, 123 Mass. 330; *Shattuck* v. *Green*, 104 Id. 45; *Bristow* v. *Evans*, 124 Id. 548; *Krumbhaar* v. *Birch*, 83 Penn. St. 428.

(*d*) *Sale by a Judicial Officer, &c.*

Another apparent exception to the rule is a sale by a judicial officer, auctioneer, &c. This will again be seen to be but an apparent exception, as obviously before the sale the purchaser is aware the goods are not the officer's, and that he sells them, without any peculiar knowledge of his own, as to the title in them. Besides, it may be said, this is analogous to the other exception just noticed, since he sells the mere interest of the prior owner to the purchaser, rather than the title to the goods themselves, without affirming what it is.

Thus SELDEN, J., in *Hoe* v. *Sanborn*, 21 N. Y. 556, said: "There are exceptions to the general rule. * * * The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes to sale. No doubt both the pawnbroker and the officer, if shown to have knowledge which they conceal, would be liable for fraud; or, if they could justly be presumed

to have such knowledge, would be liable upon an implied warranty. It was expressly held in the case of *Peto* v. *Blades*, 5 Taunt. 657, that the law raises an implied promise on the part of a sheriff, who sells goods taken in execution, that he does not know that he is destitute of title to the goods." See *Cross* v. *Gardner*, Carth. 90.

So in *Weidler* v. *Farmers' Bank*, 11 S. & R. (Pa.) 138, GIBSON, J., said: "The contract between the judgment-creditor and the purchaser at a sheriff's sale is not like that which arises, when, from the subject-matter and nature of the agreement, it must be conceded that the parties proceed on a supposition that the facts are in a particular way and in which the common mistake of both, is good ground to rescind the bargain; but the purchase is essentially based on a state of things resting on contingency. The parties do not treat for a title, but the creditor proposes to sell and the purchaser to buy, just whatever interest the debtor may have in the land, for nothing more is affected by the judgment; and therefore mere mistake without misrepresentation of circumstances or any other species of express fraud by the creditor, will be insufficient to enable the purchaser to recover back the price he has paid; he purchased the debtor's title such as it is, and must stand to the risk. But for actual fraud the judgment-creditor would be liable; and an innocent man who had been inveigled by him into a purchase, might rescind the contract and compel him to refund." See also *Smith* v. *Painter*, 5 S. & R. (Pa.) 223; *Freeman* v. *Caldwell*, 10 Watts (Pa.) 9; *Vandever* v. *Baker*, 13 Penn. St. 121.

(*e*) *Distinction made between Goods in, and not in, Possession of Vendor.*

In the United States and Canada the courts appear to have drawn a distinction between goods in possession of the vendor and those not, in relation to the implied warranty of title.

In speaking of this in *Byrnside* v. *Burdett*, 15 West Va. 702, HAYMOND, J., quoted the remarks of Mr. Benjamin: "In the second American edition of Benjamin on Sales, it is said, at sect. 641, pp. 594 and 595, that in America the distinction between goods in possession of the vendor and those not in possession, so decisively repudiated by BULLER, J., in *Pasley* v. *Freeman*, 3 T. R. 58, and by the judges in *Eichholz* v. *Bannister*, 17 C. B. N. S. 708, and in *Morley* v. *Attenborough*, 3 Ex. 500, seems to be fully upheld; and the rule there is, that as to goods in possession

of the vendor there is an implied warranty of title, but when the goods sold are in possession of a third party at the time of the sale, there is no such warranty and the vendor buys at his peril. And in the note of the learned editor of the last edition of Story on Sales (3d ed., p. 459), it is said that "this distinction has now become so deeply rooted in the decisions of the courts, in the *dicta* of judges, and in the conclusions of the learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated. And Kent sustains this view of the law: 2 Kent, p. 478."

In *Word* v. *Cavin*, 1 Head (Tenn.) 506, McKINNEY, J., said: "As regards the sale of *personal* property, the settled rule is, that if one sells goods or chattels as owner, being clothed with visible ownership or possession at the time of the sale, he impliedly undertakes and promises, though nothing be stipulated or said upon the subject, that the goods or chattels are his property, and that he has a lawful right to make the sale and transfer he proposes to make; and if he were not the owner at the time of the sale, and the property was in a third person, who subsequently claims and deprive the purchaser of it, the seller will be responsible in damages for the breach of such implied undertaking: Addison on Con. 248–55. This principle does not apply when the seller is not in possession of the property at the time of the sale, nor where the person does not sell *as owner* of the property, but in some special character or capacity, and this is known to the purchaser. In such case the purchaser is bound to look to his vendor."

In *Somers* v. *O'Donohue*, 9 U. Ca. C. P. 210, DRAPER, C. J., said: "Notwithstanding the case of *Morley* v. *Attenborough*, and particularly after the case of *Sims* v. *Marryat*, I should have great hesitation in holding, that where a man having a chattel in his possession sells and delivers it to another for value, there is not from the very nature of the transaction an implied undertaking that he has a right to sell. Possession is a clear *indicium* of property, and a purchaser ought, in the absence of any circumstances to create a doubt, to be able to rely on it without further inquiry, for it is within the vendor's knowledge when and how he came by the possession, and in acquiring it, he may fairly be assumed to have relied on the responsibility of his immediate vendor. The authorities, especially the older cases, were all brought in review by the counsel in arguing *Morley* v. *Attenborough*, and it is unneces-

sary to refer to them again *seriatim*. The strong inclination of my own opinion is, to hold that where a man sells a chattel as his own, which is at the time of sale in his actual possession, and delivers it to the purchaser from whom it is taken by the rightful owner, the vendor is to be treated as impliedly warranting that he has a right to sell, and is therefore bound to compensate his vendee for the loss."

In *Shattuck* v. *Green*, 104 Mass. 42, MORTON, J., said it was a "general rule of law in this country, that in a sale of chattels a warranty of title is implied, unless the circumstances are such as to give rise to a contrary presumption: 1 Smith's Lead. Cas., 6th Am. ed., 242; 1 Parsons on Contracts, 5th ed., 576. If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title and a warranty is implied;" and in *Whitney* v. *Heywood*, 6 Cush. (Mass.) 82, DEWEY, J., said: "Possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied." The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells property thus held as his, a warranty of title is implied: *Hubbard* v. *Bliss*, 12 Allen (Mass.) 590; *Cushing* v. *Breed*, 14 Id. 376. See also *Storm* v. *Smith*, 43 Miss. 497; *Whitney* v. *Heywood*, 6 Cush. (Mass.) 82; *Line* v. *Smith*, 4 Fla. 47; *Emerson* v. *Brigham*, 10 Mass. 202; *Coolidge* v. *Brigham*, 1 Metc. (Mass.) 551; *Inge* v. *Bond*, 3 Hawks (N. C.) 101; *Thurston* v. *Spratt*, 52 Me. 202; *McCabe* v. *Morehead*, 1 W. & S. (Pa.) 513; *McCoy* v. *Artcher*, 3 Barb. (N. Y.) 323; *Dresser* v. *Ainsworth*, 9 Id. 619; *Long* v. *Hickingbottom*, 28 Miss. 772; *Huntingdon* v. *Hall*, 36 Me. 501; *Moser* v. *Hoch*, 3 Penn. St. 230; *Boyd* v. *Bopst*, 2 Dall. (Pa.) 91; *Gross* v. *Kierski*, 41 Cal. 114.

(*g*) *Proof of Eviction or Disturbance before Action.*

The authorities in relation to the question, whether it is necessary to prove a disturbance in the possession of the chattel or a recovery by the real owner before an action by the vendee for breach of warranty will lie, are not perfectly harmonious.

In New York in *Case* v. *Hall*, 24 Wend. (N. Y.) 103, NELSON, C. J., said: "Where, however, the vendee relies on the warranty of title, either express or implied, there must be a recovery by the real owner before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach of the contract in analogy to the case of covenant." See also *Vibbard et al.* v. *Johnson*, 19 Johns. (N. Y.) 77; *Sweetman* v. *Prince*, 62 Barb. (N. Y.) 256.

In California, in *Gross* v. *Kierski*, 41 Cal. 111, it was held that, where goods are in possession of the vendor at the time of the sale, the Statute of Limitations, upon the implied warranty of title to chattels, does not begin to run until the vendee is disturbed in possession.

WALLACE, J., said, *arguendo:* "In an action brought against the vendor of chattels upon an *express* warranty of title, the authorities are believed to be uniform upon the point that there is no breach in contemplation of law until the vendee's possession of the goods is in some way disturbed, by reason of the title of the true owner. No substantial difference in this respect is perceived between an express warranty of title made by a vendor upon the sale of chattels out of possession and the warranty of title implied by law upon a sale of goods in possession. * * * It is true the Court of Appeals of Kentucky hold that there is a distinction between an express warranty of title to chattels and the warranty of title implied by law. The express warranty is likened to a *covenant* to warrant and defend the title, when inserted in a deed of conveyance of lands, and is, therefore, said to be unbroken until an eviction by the true owner, under paramount title, has taken place. The implied warranty is, however, compared to a covenant of seisin, which is said to be broken, if at all, the instant that it is entered into. As a consequence, it is the settled rule in that state that the Statute of Limitations upon breach of an express warranty of title to personal property commences to run from the time when the vendee is disturbed; while in case of implied warranty it is set in motion instantly upon the sale and delivery of the goods: *Payne* v. *Rodden*, 4 Bibb (Ky.) 304; *Scott* v. *Scott*, 2 Marshall (Ky.) 217; *Tiptart* v. *Triplett*, 1 Metc. (Ky.) 570; *Chancellor* v. *Wiggins*, 4 B. Mon. (Ky.) 202. For the distinction thus made I think that no good reason can be shown. Its operation would, in many instances, deprive the purchaser of the very protection which it is the purpose of the

implication to afford. Nor is it clear that the analogy supposed to exist between the covenant of seisin and the implied warranty of chattels can be maintained. * * * The doctrine of the Court of Appeals of Kentucky is believed to be unsupported either by text writers upon the law or the adjudicators of the courts of other states of the Union."

In *Linton* v. *Porter*, 31 Ill. 107, an action was brought upon a note given upon the purchase of a chattel. The Supreme Court of Illinois held, it was no defence that the vendor had no title while the possession of the vendee remained undisturbed by the true owner.

In *Word* v. *Cavin*, 1 Head (Tenn.) 507, it was held that, on an action upon the implied warranty of title, the Statute of Limitations commenced to run upon the possession of the chattel being lost, or upon a voluntary offer by the vendee to restore it, to the true owner.

In *Dryden* v. *Kellogg*, 2 Mo. App. 92, the court said: "In cases of personal property the rule is well settled that the warrantee need not incur the expense of fruitless resistance against the paramount owner. But * * * he must show conclusively that the title to which he has surrendered was better than his own."

In Massachusetts, the rule is otherwise, and the courts hold that if a chattel be sold to which the vendor has no title, the purchaser may maintain an action against him to recover damages therefor; and it is immaterial whether the purchaser has been deprived of possession of the chattel or not: *Grose et al.* v. *Hennessey*, 13 Allen (Mass.) 389.

In *Perkins* v. *Whelan*, 116 Mass. 542, MORTON, J., said: "The plaintiff's cause of action is founded upon the breach of the warranty of title implied in the sale of the horse by John Whelan to him. This breach occurred at the time of the sale, and the right to sue then accrued. The case is analogous to an action for a breach of the covenants in a deed against encumbrances, where it is held that the covenant is broken as soon as the deed is delivered, and an action accrues for such breach. * * * In *Grose* v. *Hennessey*, 13 Allen 389, it was held that an action for a breach of the warranty of title in a chattel could be maintained by the buyer, although he had not been disturbed in his possession. This implies, and is consistent only with the rule, that the warranty is broken at the time of the sale and the cause of action then accrues."

In Pennsylvania, we are not aware that the point is absolutely decided.

In *Krumbhaar* v. *Birch*, 83 Penn. St. 428, MERCUR, J., said, "Where defence is made to the payment of the purchase-money for breach of warranty of title, there should be proof of eviction, or of an involuntary loss of the possession. The warranty of title is a part of the consideration, while the vendee holds the covenant, and retains possession, he cannot withhold the purchase-money. The right to detain the purchase-money is in the nature of an action on the covenant. A vendee who seeks to detain by virtue of a covenant of warranty of title, in the absence of fraud, is as much bound to prove an eviction as if he was a plaintiff in an action of covenant. * * * The purchaser of personal property, who takes and retains possession thereof, and uses and consumes the same, cannot afterwards prevent a recovery of the price he agreed to pay by showing he had bought the title of a third person."

These remarks were scarcely more than *dicta*, and are apparently opposed to the remarks of SHARSWOOD, J., in *Flynn* v. *Allen*, 57 Penn. St. 485.

In speaking of this subject, that eminent jurist said, "If the assignee of a bond cannot recover it from the obligee by the reason of the consideration of it having failed before the assignment of it was made, he may recover back from the assignor the money he paid for the assignment, whether he hold the guaranty or not: *Kauffelt* v. *Leber*, 9 W. & S. (Pa.) 93. Like other warranties of title, as of seisin or right to convey, it is broken as soon as it is made, if in point of fact it is not a valid security. The assignee need not wait until it is due before bringing suit. His right of action accrues immediately: *Holder* v. *Taylor*, Hob. 12; *Bender* v. *Fromberger*, 4 Dall. (Pa.) 438; *Stewart* v. *West*, 2 Harris (Pa.) 336. Nor is it necessary to tender a return of the security before the commencement of the action: *Ritchie* v. *Summers*, 3 Yeates (Pa.) 531; *Fielder* v. *Starkin*, 1 H. Black. 19." *Flynn* v. *Allen*, *supra*, was not quoted by the court or counsel in *Krumbhaar* v. *Birch*, *supra*, nor were any of the cases which were cited therein by Mr. Justice SHARSWOOD.

ARTHUR BIDDLE.

(*To be continued.*)